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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

**NORMAN PERLMUTTER,**

*Petitioner,*

v.

**KATHRYN PERLMUTTER,**

*Respondent.*

Petition for Writ of Certiorari to the
Appellate Court of Illinois, Second District

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is Illinois required by the due process clause of the Fourteenth Amendment to provide a meaningful opportunity for a litigant to raise and have heard an issue concerning the judicial bias and prejudice of a trial judge at that stage of the proceedings when there first emerges a reasonable belief that the trial court was biased and prejudiced?

2. Did the opinion below articulate a view of what constitutes judicial bias and prejudice that is beyond the pale of due process requirements based upon the record in this case?

3. When must a litigant, to preserve the constitutional issue of bias and prejudice of the trial court, raise such issue in the context of a lengthy trial where the bias and prejudice emerges gradually in the latter course of the proceedings?

## LIST OF PARTIES

The parties below were: the petitioner Norman Perlmutter, who was the respondent in the Circuit Court of Lake County, Illinois, appellant in the Appellate Court of Illinois, Second District, and petitioner in the Illinois Supreme Court; and the respondent Kathryn Perlmutter, who was the petitioner in the Circuit Court, appellee in the Appellate Court, and respondent in the Supreme Court of Illinois.

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Petition for Writ of Certiorari to the
Appellate Court of Illinois, Second District

## PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to the Appellate Court of Illinois, Second District, to review the judgment and opinion of that court entered in the above-entitled proceedings on February 10, 1992.

## OPINION BELOW

The opinion of the Appellate Court of Illinois, Second District, is reported at 225 Ill. App. 3d 362, and is reprinted in the appendix hereto at App. 1-29.[1]

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[1] Due to its length, the Appendix to Petition for Writ of Certiorari is printed as a separate document. Numbers in parentheses preceded by "App." refer to Appendix pages.

## JURISDICTION

The respondent brought this suit in state court, in the Circuit Court of Lake County, Illinois. On September 12, 1990, the circuit court entered judgment resolving most of the disputed issues. (App. 33-52) On February 28, 1991, after post-trial proceedings, the circuit court entered a final order disposing of the remaining issues. (App. 55-57)

On petitioner's appeal, on February 10, 1992, a unanimous panel of three justices of the Appellate Court of Illinois, Second District, filed its opinion. (App. 1-29) On March 19, 1992, that Court denied Petitioner Norman Perlmutter's Petition for Rehearing. (App. 30) On October 7, 1992, the Supreme Court of Illinois denied Petitioner Norman Perlmutter's petition for leave to appeal to that court. (App. 31) On November 9, 1992, the Supreme Court of Illinois denied Petitioner's motion for leave to file a motion for reconsideration of the order denying petition for leave to appeal. (App. 32) This petition for a writ of certiorari is timely filed within 90 days thereafter.

The jurisdiction of this Court to review the judgment of the Appellate Court of Illinois, Second District, is invoked under Rules 10.1(c) and 13.1 of this Court.

## CONSTITUTIONAL PROVISIONS

Petitioner maintains that his rights under the following provisions of the fifth and fourteenth amendments to the United States Constitution were violated by the opinion of the Appellate Court of Illinois:

**AMENDMENT V:**

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .".

**AMENDMENT XIV:**

> Section 1. " . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

## STATEMENT OF THE CASE

The petitioner and respondent, husband and wife, were adverse parties in matrimonial litigation in the Illinois courts below. A trial consumed 34 days solely involving issues concerning the disposition of marital property between the parties. Thereafter, the trial judge in a written memorandum awarded respondent assets in excess of $7,000,000 including a money award of $2,415,000 against the petitioner. (App. 61-73)

Then, early in the post-trial proceedings, the trial judge *sua sponte* solicited a petition for sanctions against the petitioner for alleged misconduct during the trial and pretrial proceedings. (App. 120) Contemporaneously, the trial court also *sua sponte* ordered prejudgment interest to accrue on the $2,415,000 money award it had found against the petitioner. (R. C2840; App. 120)[2] The trial court described its order for prejudgment interest on $2,415,000 as a "kicker." (R. 5228-29)[3] The fee sanction hearing was held 5½ months later and prejudgment interest in excess of $100,000 had then accrued.

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[2] Numbers in parentheses preceded by "R." refer to the trial court report of proceedings; numbers in parentheses preceded by "R. C" refer to the trial court common law record.

[3] The trial court stated that it was aware that under Illinois law the judgment was not final or appealable until the sanction proceeding the court initiated was entirely concluded. (R. 5227-28) *In re Marriage of Leopando*, 78 Ill. 2d 114, 120, 449 N.E. 2d 137 (1983). (The trial court nevertheless required the petitioner to post a substantial appeal bond with surety or to face a levy as though the judgment were final. (R. C2932))

At the sanction proceeding, no evidence was offered by the respondent relating or tracing any of the respondent's costs, attorney's fees or damages to any litigation conduct of the petitioner. After all proofs were closed in the sanction proceeding, and during the final argument, the petitioner urged that the respondent's failure to connect any of the allegedly sanctionable conduct to any of respondent's legal fees or costs was a flaw in respondent's proof and a fatal defect in her claim for attorney's fees. (App. 120-21) The trial court from the bench immediately responded by criticizing the petitioner for failure to adduce in cross-examination information helpful to the respondent's case and then *sua sponte* declaring a "mistrial", ordering a *de novo* sanction proceeding. (App. 123)

At the new sanction hearing the respondent's additional evidence was an exhibit that had been prepared shortly before and especially for those proceedings. (App. 124-25) The exhibit purported to enhance and interpolate the respondent's counsel's contemporaneously made time entries by attempting to, after the fact, apportion general time entries against the claimed acts of sanctionable conduct. (App. 124) This exhibit was admitted in the second and *de novo* sanction hearing over the petitioner's objection. (App. 125-26) The trial court then, in a written memorandum, sanctioned the petitioner for eleven separate grounds of misconduct and entered a sanction judgment of $80,950 against the petitioner in favor of the respondent. (App. 77-81) The trial court did not allocate between the eleven acts sanctioned any specific amount for each act. (App. 77-81)[4]

[4] Illinois law provides that damages in the form of costs and fees must be directly connected to each of the sanctionable acts. *Berkin v. Orland Park Plaza Bank*, 191 Ill. App. 3d 1056, 1063, 548 N.E. 2d (1st Dist. 1989).

The petitioner was sanctioned for four acts that were never described or identified by the trial court with any particularity or specificity: a sanction for a "failure to produce certain documents and witnesses" never further identified or enumerated by the trial court; a sanction for raising a "spurious" tax issue, which issue was never identified or enumerated by the trial court; a sanction for a "debacle" at a particular deposition but the "debacle" was never identified or described; and a sanction for late, incomplete, and confusing answers to interrogatories concerning experts, again with no further enumeration whatsoever. (App. 80)

The petitioner was also sanctioned for failing to volunteer information about a lawsuit involving a hotel that the court had declared a marital asset (App. 80); the respondent had never sought such information from petitioner and never examined the information when it was made available (R. C2940-41).

Petitioner was sanctioned for questioning the details of respondent's Aspen condo winter vacation rental arrangement that the petitioner was ordered by the court to pay (App. 56, 80). It appeared from that rental arrangement that respondent may have artificially increased the size of the rental obligation to be imposed upon petitioner. (App. 107-10) Petitioner was also sanctioned for raising an issue about obtaining psychiatric treatment for a minor child (App. 56, 78-9) (who the court found, *before* the sanction was imposed, did in fact need psychiatric treatment) (App. 119); and petitioner was sanctioned for conduct that became misconduct only after the trial court in its sanction memorandum *sua sponte* reversed itself and declared that the particular conduct once declared by it as proper (App. 75-6) was now improper (App. 77-8).

The trial court's sanction opinion also severely criticized petitioner, the court finding that he had engaged in "tactics designed to confuse, deplete and distract" (App. 77) and that he had sought to "delay and obstruct" the proceedings (App. 79). The memorandum also praised respondent's counsel for their conduct and efforts during both the trial and pretrial proceedings. (App. 79, 81)

The trial court's sanction memorandum and order terminated the trial proceedings and the cause was then final and appealable under Illinois law; an appeal was taken by petitioner immediately. (R. C3118-44) Petitioner's appeal of right was to the Appellate Court of Illinois, Second District, and he there urged that the trial court's bias and prejudice denied him a fair trial. The Appellate Court held in its written opinion that the petitioner was precluded from raising the issue of bias and prejudice on appeal by his failure to assert that issue in the trial court during the trial on the merits or early in post-trial proceedings.[5]

The Appellate Court declared that the petitioner's claim of prejudice on the part of the trial court cannot "serve as the basis for a new trial." (App. 28) The Appellate Court's opinion held that conduct even though petitioner claims it to have been "focused only upon the end result of sanctioning . . . without regard to legal procedure or [petitioner's] rights" cannot serve as a basis for constitutional error based upon bias and prejudice. (App. 28) The Appellate Court held in its opinion, without any detailed

[5] The petitioner contended that the evidence of the trial court's bias and prejudice only became unambiguously apparent at the very conclusion of all the trial court proceedings and could not in good faith have been raised any earlier.

discussion of the trial court's conduct, rulings, and comments, that the petitioner was not deprived of a fair trial. (App. 29)[6]

A petition for rehearing to the Appellate Court urged a denial of due process because the petitioner had been refused any meaningful opportunity whatsoever to ever raise the issue of judicial bias and prejudice. The Appellate Court without opinion denied the petition for rehearing. (App. 30)

The Supreme Court of Illinois declined to grant its discretionary petition for review (App. 31) and subsequently denied a rehearing to reconsider its refusal to grant an appeal (App. 32). In both his petition for leave to appeal to the Supreme Court of Illinois and the request for rehearing, the petitioner urged that the issue of the trial court's bias was a due process issue and petitioner in derogation of his constitutional rights was denied effectively the opportunity to raise the issue.

## REASONS FOR GRANTING THE WRIT

### I. REASONS FOR HEARING A MATRIMONIAL CASE.

We seek certiorari in a matrimonial case fully aware that the Court, being daily occupied with immense and wide-sweeping issues involving significant public policy questions, rarely hears divorce matters. Nevertheless, we believe and respectfully urge that the instant matrimonial case commends itself to review by this Court because it presents an important issue concerning the administration of justice.

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[6] The Appellate Court did, however, reverse the trial judge on the merits and ordered substantial additional proceedings but without requiring any change in the trial judge. (App. 29)

This Court as part of its constitutional function manifestly has the ultimate responsibility for supervising the due process conduct of the nation's courts, both state and federal. U.S. CONST., art. 3; *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978). As the Court is certainly aware, the country has suffered a national litigation explosion that imposes enormous pressures on the resources of the state courts as well as the federal judiciary.[7]

In the state courts, the litigation explosion has resulted in a substantial number of new judges ascending to the bench who are not always as experienced or sophisticated as their predecessors and who are often immediately assigned cases involving matters that may not have been within their previous professional exposure or experience.[8]

In many of the states, and particularly in large urban areas, one of the largest and most often congested dockets confronting the trial courts is the matrimonial docket where cases are heard that involve divorce and marital

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[7] Cullen, As Lawsuits Stall, More Disputes Go Private, The Boston Globe, Nov. 11, 1991 (National/Foreign), at 1; Court Statistics Project of the National Center for State Courts (1992); Joseph Kelner and Robert S. Kelner, The Courts in Crisis, New York Law Journal, Sep. 24, 1991, at 3; Matthew T. Crosson, Judicial System Facing a Financial Crisis, New York Law Journal, May 6, 1991 (Supreme Court of the State of New York; Tricentennial), at S-7.

[8] Karen Levine, State Judges Found to be Underpaid, Overworked; Low Pay Means Fewer Judicial Applicants, Massachusetts Lawyers Weekly, Nov. 30, 1992, at 3; Simon, Upset Victor Is Settling Into Court—"He's Not The Oddball I Thought He Was," The Seattle Times, Aug. 25, 1991 (Northwest), at B1; Size of Federal Judiciary Threat to Quality, The Connecticut Law Tribune, Nov. 4, 1991 (Verbatim), at 3.

property rights, child custody and support rights, etc.[9] Matrimonial cases by their very nature publicly air private, intimate questions concerning the conduct, lifestyle, and problems of litigants in every stratum of society; axiomatically, such cases concern and determine individual, family and business lives in a personal way matched by almost no other litigation. Moreover, a single matrimonial case can impact in ripple effect on the lives of many individuals and families aside from the immediate parties so the sweep and interest in a matrimonial case is often far beyond the actual parties in court.

Although not perhaps capable of empirical proof, it is probable that (save for possibly traffic court) the majority of persons in the United States who are exposed to any court system directly or indirectly have such exposure with a matrimonial case. Accordingly, the public's confidence in the judicial system can be especially and profoundly impacted and adversely affected if matrimonial courts are perceived as not always affording fair and impartial treatment in their conduct and determinations. Nevertheless, in the urban areas, it is often in the matrimonial courts that the most junior and least experienced judges are assigned; and they preside over glutted dockets, with overworked staffs and in crowded and depressing courtrooms, constantly hearing and adjudicating sad and tragic family issues sometimes in turnstile fashion.[10] And it is readily understandable and foreseeable that in any milieu of a docket with a crush of cases and emotionally-

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[9] Jay Romano, Divorce Logjam Leads to Alternatives, New York Times, Jul. 26, 1992 (13NJ), at 1, col. 2.

[10] H. Downs, Deadly Decisions, ABC News 20/20, Aug. 21, 1992.

charged issues and parties, fundamental due process guarantees are often unwittingly ignored and not observed.[11]

Plainly, the ultimate safety valve ensuring that the nation's divorce courts remain sensitive and faithful to fundamental constitutional guarantees and therefore administer justice and do not erode confidence in the legal system is the Court's enforcement of constitutional due process guarantees. We submit that an opinion of this Court concerning procedural due process requirements in the context of a matrimonial case could have a greater positive impact on the daily operation of those courts than perhaps any of the myriad of suggestions constantly being advanced to improve the country's divorce courts.[12] We believe that the instant case presents an opportunity for this Court to do so; the case raises a serious issue of the boundaries of procedural due process in the context of judicial bias that would have application generally.

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[11] Slate, Federal Courts: An Exhaustible Resource, The Recorder, Mar. 2, 1992, at 10; Dennis C. Kolenda, Michigan Lawyers Weekly, Apr. 29, 1991 (This Week's Opinions; Michigan's Most Respected Judges), at 25; William R. Dalsimer, What Kind of Justice in Family Courts, New York Law Journal, Feb. 11, 1991 (Letters to the Editor), at 2.

[12] Susan Roberts Boyle, Proposed Family Law Bill Gets Thumbs Down From Bar; Lawyers See Delays, Constitutional Issues, Massachusetts Lawyers Weekly, Nov. 2, 1992, at 2; Parents' and Children's Rights Group Demonstrates For Legal Reform; Changes in New York Courts With Abuse and Abrogation of Parents' Rights, PR Newswire, Jul. 6, 1992 (State and Regional News); John Blake, De-fanging Divorce; Capitol Vigil Held to Urge New Laws for Children's Sake, Atlanta Journal and Constitution, Jan. 13, 1992 (State News, C) at 2; Court Reform and Children: Beware of False Expectations, Massachusetts Lawyers Weekly, Dec. 2, 1991 (Editorial), at 4.

## II. THE TRIAL COURT'S BIAS AND PREJUDICE EMERGED ONLY AT THE END OF THE CASE.

The petitioner urged below that a serious bias and prejudice by the trial court against him first emerged at the very end of post-trial court proceedings, months after the case on the merits had been decided. There is no claim by petitioner that the conduct of the trial on the merits would sustain any good faith claim that the lower court had bias or prejudice against the petitioner.[13] Instead, the question of judicial bias began to suggest itself to petitioner *after* the trial and after the decision on the merits had been rendered by the lower court (App. 33-52). The petitioner's concern first arose when the lower court in post-trial proceedings gratuitously invited sanction proceedings against the petitioner. (App. 120) Moreover, that post-trial invitation by the trial court was coupled with the trial court's simultaneous and *sua sponte* ordering that prejudgment interest on a $2,415,000 cash award against petitioner begin to accrue immediately. (R. C2840) This double-pronged spontaneous judicial action, we submit, would clearly cause almost any litigant concern about a trial court's possible partisanship; however, standing alone the conduct is plainly insufficient to justify a claim of bias or prejudice.

Also, at the sanction proceeding prior to the close of proofs, the trial court's actions did not create justifica-

[13] The petitioner did present to the Appellate Court that during the trial the trial judge was permissive of inappropriate behavior of respondent's counsel. The petitioner did not claim that this permissiveness by the trial court revealed bias and prejudice during the trial but, rather, cited it to the Appellate Court solely to contrast the trial court's last day fulsome praise of respondent's counsel and sharp criticism of petitioner's counsel (in the sanction memorandum) (App. 79, 81).

tion sufficient to raise the claim that the trial court had bias or prejudice against petitioner. However, *after* all proofs were closed in the sanction proceeding and during the closing argument, the trial court *sua sponte* ordered a mistrial to permit respondent to cure fatal flaws in her proof; those flaws in respondent's proof had been urged to the trial court by petitioner in the closing argument (App. 121-23). Pursuant to the trial court's *sua sponte* order, a second and *de novo* sanction hearing then ensued. In that second sanction proceeding, the trial court admitted in evidence, over objection, a spurious self-serving document prepared by respondent for the hearing and to cure the defect in damage proof that had been raised by petitioner in the closing argument of the first sanction proceeding (App. 124-25); the exhibit was then used by the trial court in preparing its memorandum sanctioning petitioner.[14]

The trial court in its sanction memorandum found an inordinately large number of sanctions against petitioner (eleven); the memorandum also gratuitously heaped substantial praise upon opposing counsel and in very general terms sharply chastised petitioner. The trial court in a number of instances sanctioned petitioner without any definitive findings or description as to the particular acts being condemned and punished by the trial court. Indeed, we submit that no one after reading the trial court's sanction memorandum as to at least four sanctions (App. 79-80)

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[14] The respondent's counsel had sought to put the contents of the document in question into the record during the closing argument of the first sanction proceeding upon hearing petitioner's presentation that the respondent's proof was defective. (App. 122) Petitioner's objection to such an unusual attempt prompted the trial court to immediately grant a mistrial (App. 123); respondent in the second proceeding was then able to place the document in evidence (App. 124-25).

could possibly know or ascertain the precise reasons or behavior for which petitioner was being sanctioned—even though in Illinois sanctions are penal in nature to the litigant (*Harris v. Harris*, 196 Ill. App. 3d 815, 829, 555 N.E. 2d 10 (1st Dist. 1990)) and sanction findings must be very specific as to the conduct being punished (*Berkin v. Orland Park Plaza Bank*, 191 Ill. App. 3d 1056, 1063, 548 N.E. 2d 534 (1st Dist. 1989)). Instead, the trial court's opinion alludes to a failure by petitioner to produce documents or witnesses (never identified); to wrongful behavior of petitioner in raising a spurious tax issue never articulated by the trial court; to petitioner's filing, in connection with discovery involving experts, insufficient interrogatory answers with no further amplification by the court; and to a deposition "debacle" without further findings.

Petitioner was also sanctioned for seeking a transfer of venue to Cook County, Illinois, from Lake County, Illinois, early in the trial court proceedings. He had urged two grounds for this transfer motion: (1) *forum non conveniens* and (2) an express agreement between counsel for the parties to litigate the case in adjoining Cook County. (App. 83-5, 86-8) The trial court on October 11, 1988, denied petitioner's motion and in a written opinion held that the issue of *forum non conveniens* was a very close question. (App. 75) However, the court then held that petitioner's claim of an agreement between opposing counsel to litigate in Cook County was made without any reasonable inquiry or factual basis and that sanctions would accordingly be imposed solely *for urging this contention* (App. 75-6).[15]

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[15] The petitioner's lawyers in the Cook County action, Peer Pedersen and Mark Janser, both had in fact testified under oath

(Footnote continued on following page)

Two and one-half years later, at the post-trial sanction proceedings, the respondent, in claiming legal fees for the transfer motion, made no attempt to divide the fees incurred as between the *forum non conveniens* issue and the agreement-of-counsel issue; counsel's time sheets were never so maintained or organized despite the trial court's 1988 ruling. (App. 121-23, 124) The trial court in its sanction memorandum cured this failure of respondent's proof by *sua sponte* reversing its 1988 ruling that petitioner had reasonable grounds to seek a transfer on *forum non conveniens* grounds and holding that the petitioner's entire venue transfer motion was sanctionable for being without good cause: the trial court in its sanction memorandum ordered the petitioner to pay *all* of respondent's fees and costs for the entire venue proceeding. (App. 77-8)

In still another sanction, the trial court had ordered the petitioner to pay a one-week leasing cost for a condominium respondent rented in Aspen, Colorado, during a winter vacation break. The respondent, however, leased the vacation condominium for *two* weeks and the total rental was approximately $11,000. Respondent unilaterally arranged that her week's rental cost would be $1,500 while the rental week the petitioner was to pay would be $9,450. (App. 107-110) The petitioner, upon discovering the arrangement, questioned its fairness and propriety; the trial court ruled against the petitioner on the merits and required petitioner to pay in full for the $9,450 week. (App. 71)

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[15] *continued*
to the court below at the venue hearing that they had such an agreement with respondent's attorneys, Mr. DuCanto, Mr. Fleck and Mr. O'Brien. (App. 99-101, 101-03; compare App. 103-06) The petitioner had no other source of information to which he could inquire. Nevertheless, the trial court found that the petitioner had not investigated and had no basis for his claim. (App. 75-76)

In its sanction memorandum the trial court *sua sponte*, and without any pleadings by respondent claiming that petitioner was guilty of misconduct (R. C2861-81, R. C2882-84), ruled that the inquiry into and challenge of this disparate rent arrangement was sanctionable behavior (App. 80-81).

And, in still another instance, petitioner was sanctioned for seeking a court order directing psychiatric treatment for a minor child (App. 78-9), even though much earlier and during the trial on the merits, the trial court acknowledged that the child did need such treatment and ordered it (App. 118-19).

The Illinois law declares that sanctions are not a punishment by fine but rather are awarded *only* to recompense a litigant for actual damage suffered by the offending behavior of an adversary party.[16] However, the trial court in rendering sanctions against petitioner stated concerning the purpose of its actions:

> * * * it's not merely to compensate Mrs. Perlmutter for the additional attorneys' fees that she may have had to expend, but it's for the administration of the

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[16] In Illinois, while sanctions pursuant to Supreme Court Rule 137 and its statutory predecessor, §2-611 of the Code of Civil Procedure (Ill.Rev.Stat., ch. 110, ¶2-611) are penal in nature, nevertheless a trial court should not impose sanctions intended primarily as punishment. See *Hardware Wholesalers, Inc. v. Clemenic*, 124 Ill. App. 3d 304, 308, 464 N.E. 2d 700 (1st Dist. 1984); *Cedrick Spring & Associates, Inc. v. N.E.I. Corp.*, 181 Ill. App. 3d 1031, 1035, 401 N.E. 2d 352 (2d Dist. 1980). It is not the purpose of Rule 137 or §2-611 to penalize litigants simply because they have been unsuccessful in the litigation (*In re Marriage of Sykes*, 231 Ill. App. 3d 940, 946, 596 N.E. 2d 1226 (4th Dist. 1992)) or because an argument or theory of recovery is found to be unjustified (*Lecrone v. Leckrone*, 220 Ill. App. 3d 372, 378, 580 N.E. 2d 1233 (1st Dist. 1991)).

> system and the way lawyers conduct themselves in this court. * * * So it's beyond just sanctions for recompensing Mrs. Perlmutter. (App. 123)

We submit that only after the trial court's sanction memorandum and order were mirrored against *all* of the trial court's actions from the time of initiating sanctions against the petitioner, that the petitioner manifestly first had a reasonable and a good faith basis for believing that the trial court bore bias and prejudice. It was at the very end of the proceedings that the totality of all the trial court's conduct, coalescing in the sanction memorandum, finally presented a clear, maintainable claim that the trial court had assumed an adversarial posture and was intent upon substantially punishing petitioner regardless of what the actual proof or evidence might turn out to be. See *In re Murchison*, 349 U.S. 133, 136 (1955). In other words, at the moment the case ended, petitioner could first reasonably conclude that the trial court bore such bias that sanction proceedings were from their inception a hollow and meaningless formality preliminary to punishment; the trial court had no concern with procedure, the law or the evidence in terms of judging the petitioner, thereby infecting the trial court's holding on the merits.[17]

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[17] Stephen Katz, one of respondent's attorneys, filed a fee petition pursuant to an Illinois statute ("a 508 petition") permitting the court to apportion respondent's attorney fees between the parties based on ability to pay (Ill. Rev. Stat., ch. 40, sec. 508). (R. C2882-84) The court, however, had previously ruled it would disallow all sec. 508 fee petitions. (App. 120) On the last day of the second sanction proceeding after all proofs closed and after the petitioner's counsel advised the court that the Katz petition requested no fees based on sanctions and was a 508 fee petition, the trial court immediately allowed Mr. Katz to amend his 508 petition on its face, allowing allegations of apportionment of fees and the ability to pay to stand as sanction allegations. (R. 5612)

(Footnote continued on following page)

## III. THE ILLINOIS APPELLATE COURT IN VIOLATION OF THE DUE PROCESS CLAUSE DENIED PETITIONER ANY OPPORTUNITY TO PRESENT HIS CLAIM OF BIAS.

The Illinois Appellate Court disallowed petitioner's claim of bias and prejudice as waived for failure to raise the issue of bias and prejudice to the trial court (App. 27). The Illinois Appellate Court's opinion implicitly in its holding recognizes that there could be no waiver based upon petitioner not raising such claim to the trial court on the final day of the case (after the sanction memorandum was rendered); presenting the issue then would have been an obvious futility and purposeless. However, and most curiously, the Appellate Court's opinion does hold that the issue of judicial bias and prejudice *was* waived because petitioner had not raised the claim *during* the trial on the merits or early in the post-trial proceedings before the sanction proceedings ever commenced. (App. 26-27) But at both of those junctures in the proceedings the trial court's bias was not reasonably clear or demonstrable by a responsible litigant; the trial court's conduct at those focal points in the proceedings could have merely been the product of judicial error. Thus, raising the issue of bias and prejudice at the times ruled necessary by the Illinois Appellate Court's opinion to preserve the point and avoid a waiver would not only have been a premature raising of the issue, a diversion of the trial proceedings and resources, and inappropriate as not ripe but could well have exposed petitioner to sanctions for chal-

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[17] *continued*
The court thereafter allowed as sanctions against the petitioner the fees Mr. Katz had sought under section 508 (App. 80-81) even though sanction conduct and fees bear almost no relationship whatsoever to a section 508 claim for fees.

lenging the trial court without good cause or a proper factual basis. *In re Marriage of Sykes*, 231 Ill. App. 3d 940, 946, 596 N.E. 2d 1226 (4th Dist. 1992) And the Appellate Court's opinion in so holding is in actuality, albeit in the guise of holding a waiver, effectively denying petitioner *any* opportunity to raise the issue of bias and prejudice of the trial court; the consequence of its holding is a waiver unless made at a time when the point *cannot* be made for a lack of reasonable basis. And, indeed, when the bias and prejudice issue does finally ripen to be responsibly presented, the Appellate Court finds a waiver for not having been raised earlier (when it could not have been in good faith raised).

A holding or doctrine that in practical effect precludes a party from ever being able to present a valid due process claim here because the party is always either too early or too late and never timely, is constitutionally impermissible. *Young v. Ragen*, 337 U.S. 235, 238 (1949). This Court long ago condemned Illinois' procedure that became in actual operation a procedural bar precluding a litigant from ever presenting his constitutional claim. *Marino v. Ragen*, 332 U.S. 561, 564 (1947) (Rutledge, J., concurring). The issue of judicial bias and prejudice can only be presented by a litigant at that point in the proceedings when there appears justifiable grounds to present the issue and constitutionally cannot be judicially foreclosed because of not raising the issue when it is premature. *See also Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992). The Court has never spoken on this issue. But the administration of justice requires that litigation proceed in an orderly fashion consonant within the pleadings and that there be a minimum of trial time expended raising premature constitutional issues collateral to the merits; public policy requires discouraging the early raising of such claims solely to ensure preserving points and avoiding a waiver.

Finally, the Illinois Appellate Court's opinion, without any discussion or making any finding whatsoever as to whether any of the trial court's conduct displayed any bias or prejudice, simply declared that petitioner did receive a fair trial. (App. 27-29) Seemingly, the Appellate Court's opinion was never focused on the sum totality of the inferences and consequences of the trial court's post-trial conduct, particularly its provoking and then adjudicating a sanction proceeding against petitioner that resulted in a remarkable number of sanctions against petitioner. Indeed, the Illinois Appellate Court's opinion even appears to hold that assuming the trial court was in fact intent upon sanctioning petitioner without regard to his rights or to legal procedure, nevertheless such trial court's conduct does not entitle petitioner to claim that he was denied a fair trial. (App. 27-28) The Appellate Court, we submit, most incorrectly has held that a proceeding can be constitutional and within the bounds of the Fourteenth Amendment *even* if the trial court conducts itself without regard to a litigant's rights or accepted legal procedure.[18]

## CONCLUSION

We ask that this Court grant certiorari and review the proceedings below and then declare that procedural due process mandates (a) that there is a secured right to raise an issue of fair trial based upon judicial bias and prejudice

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[18] *In re Murchison*, 349 U.S. 133, 136 (1955). Biased decision-makers do not satisfy procedural due process. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980). "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial * * *." Holmes, *Frank v. Mangum*, 237 N.S. 309, 347 (1914). *See also Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992).

at that point in the proceedings that a litigant has a good faith, reasonable basis for believing that the trial court has bias and prejudice and (b) that the Appellate Court of Illinois' opinion was constitutionally incorrect in terms of procedural due process in precluding petitioner any meaningful opportunity to present this issue by fashioning an erroneous concept of waiver that effectively bars a litigant from ever having this issue of trial bias heard.

Respectfully submitted,

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